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IN THE

Supreme Court of the United States

October Term, 1963

No. 670

BOARD OF EDUCATION OF THE CITY OF BIRMINGHAM, *et al.*,
Petitioners,

—v.—

DWIGHT ARMSTRONG, *et al.*

LINDA SUE GIBSON, *et al.*,
Petitioners,

—v.—

CAROLYN ELEANOR HARRIS, *et al.*

LAWRENCE ROBERTS, *et al.*,
Petitioners,

—v.—

RALPH STELL, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
DERRICK A. BELL, JR.
NORMAN C. AMAKER
GEORGE B. SMITH
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019
Attorneys for Respondents

OSCAR W. ADAMS, JR.
E. H. GADSDEN
DONALD L. HOLLOWELL
ERNEST D. JACKSON, SR.
B. CLARENCE MAYFIELD
HORACE WARD
Of Counsel

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Opinions Below

The opinions of the Court of Appeals are printed in the appendix to the petition for certiorari and have been reported as follows: *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425; *Armstrong* v. *Board of Education of City of Birmingham, Ala.*, 323 F. 2d 333; *Harris* v. *Gibson and Glynn County Board of Education*, 322 F. 2d 780.

Jurisdiction

The order of the Fifth Circuit in the Savannah case (*Stell*) was entered on May 24, 1963.[1] The order of the Fifth Circuit in the Birmingham case (*Armstrong*) was entered on July 12, 1963. The petition for certiorari in all three cases was filed in this Court on December 11, 1963, six and one-half months after the order in the Savannah case and nearly five months after the order in the Birmingham case. It is submitted that the petition in the Savannah and Birmingham cases is out of time.

The order of the court of appeals in the Glynn County case was entered on September 12, 1963. No jurisdictional objection is made to the petition in that case.

Questions Presented

1. Where an order of a court of appeals is reviewable by certiorari, can review of that order be sought more than ninety days after entry?

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[1] In all three cases the Fifth Circuit's order is embodied in the opinion. No separate judgment was entered.

2. Where the facts are not disputed and a district court has enjoined limited public school desegregation undertaken voluntarily by a local school board, does a court of appeals lack the power to prevent mootness and irreparable injury by directing the district court to issue an injunction pending appeal?

Statutes Involved

These cases involve, in addition to the statutes cited in the petition for certiorari:

28 U. S. C. §1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U. S. C. §2101(c):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Rules of the Supreme Court, Rule 20:

> Certiorari to a Court of Appeals Before Judgment
>
> A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to

require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

Statement

Savannah, Georgia (*Roberts* v. *Stell*)

Suit was filed in the district court on January 18, 1962, to desegregate the public school system of the City of Savannah and the County of Chatham, Georgia. The Negro plaintiffs' motion for preliminary injunction was not heard until May 9-13, 1963, and then only because Chief Judge Tuttle of the Fifth Circuit had implied, in response to a petition by plaintiffs, that another district judge would be assigned if no ruling were made by May 13, 1963.

On May 9, 1963, the plaintiffs proved conclusively that the schools were segregated, and the defendant Board of Education offered no contradictory evidence. Nevertheless, the district court refused to grant a preliminary injunction, but allowed intervening white defendants—petitioners here—to put on evidence of alleged inferiority of Negroes as a group and supposed injury to both races as a consequence of integration. On May 13, 1963, the district court found that "the primary and secondary public schools of Savannah-Chatham County are divided into schools for white pupils and schools for Negro pupils and admission thereto is limited to applicants of the respective races." However, it denied injunctive relief.

Following plaintiffs' notice of appeal and a motion for injunction pending appeal, the Fifth Circuit on May 24,

1963, issued an order directing the district court to enjoin segregation in accordance with *Brown* v. *Board of Education*, 349 U. S. 294. The district court was further ordered to require the submission of a plan including grade-a-year desegregation beginning the following September.[2]

The petition for certiorari in this case was filed December 11, 1963, on behalf of the intervening white defendants. The Board of Education did not join in the petition. The record filed in this Court contains essentially only those papers filed with the Fifth Circuit after the filing of the motion for injunction pending appeal. The record of proceedings in the district court has not been filed in this Court.

Birmingham, Alabama (*Board of Education* v. *Armstrong*)

In Birmingham, the suit to desegregate the public schools was instituted on June 17, 1960. At trial in October, 1962, overwhelming evidence of complete segregation was presented. As the district court summarized the "undisputed facts":

> . . . it graphically appears from the testimony of Dr. Theo R. Wright, Superintendent of Birmingham Public Schools, that he and the Birmingham Board of Education have operated a segregated school system based upon race in the past, are doing so now, and have formulated no plans to discontinue such an operation.

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[2] Subsequently, the district court issued the required injunction. The Board of Education submitted a plan, and plaintiffs submitted objections. The district court refused to rule on the objections. Nevertheless, fourteen Negroes actually entered white schools in September 1963, and the transfer applications of seven others were accepted.

The record on appeal has been printed, and appellants have submitted their brief to the Fifth Circuit. In addition, a supplemental record of events occurring since the injunction has been filed with the Fifth Circuit for printing.

On May 24, 1963, the district court denied injunctive relief on the ground that administrative remedies provided by the Alabama Pupil Placement Act had not been exhausted. On plaintiffs' motion for injunction pending appeal, the Fifth Circuit ruled that exhaustion of those remedies was not a prerequisite to relief in the federal courts. Its order of July 12, 1963, directed the district court to issue an injunction pending appeal enjoining compulsory segregation and requiring the submission of a plan by August 19, 1963, for a start on desegregation by September.[3]

The petition for certiorari in this case was filed December 11, 1963, on behalf of the defendant Board of Education. The record of proceedings in the district court has not been filed in this Court.

Glynn County, Georgia (*Gibson* v. *Harris*)

This is not a typical school segregation case. Before any suit was filed the Glynn County Board of Education voluntarily granted the applications of six Negro students for transfer to the white high school. The plaintiffs, a group of white students and parents, obtained a temporary restraining order from the district court enjoining the school board from effecting the proposed transfers on August 27, 1963, the day before the school term began. A group of Negro students and parents intervened as defendants and requested an injunction restraining interference with the six proposed transfers and desegregating

[3] Subsequently the required injunction was issued. The Board of Education submitted its plan, which was approved before plaintiffs had an opportunity to see it. Five Negro students were admitted to white schools in September.

The record in the Fifth Circuit has been printed, and appellants have submitted their brief. A supplemental record of events occurring since the injunction will be submitted by appellants soon.

the school system. On September 6, 1963, the district court entered a "pre-trial order" outlining a time-consuming program for the preparation of a plan for assignment and transfer, and ordered all other questions "held in abeyance." The intervenors appealed.

On intervenors' motion the Fifth Circuit on September 24, 1963, construed the second district court order as a preliminary injunction restraining the proposed assignments. The Court of Appeals vacated both of the district court's orders and issued its own order directing the district court to issue an injunction pending appeal requiring the Board of Education to admit the six Negro students to the white school.[1]

The petition for certiorari in this case was filed December 11, 1963, on behalf of the plaintiffs, white parents and students. The Board of Education did not join in the petition. The record filed in this Court does not contain the record of proceedings in the district court.

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[1] Subsequently, the district court entered the required injunction, and the six Negro students were admitted to the white school. The record on appeal in the Fifth Circuit has been printed. Appellants' brief is due February 1, 1964.

The Board of Education has also appealed to the Fifth Circuit from the district court's order of September 6, 1963, and order in compliance with the Fifth Circuit's mandate.

ARGUMENT.

I.

The Petition in the Savannah and Birmingham Cases Is Out of Time and Must Be Denied.

In the Savannah and Birmingham cases, the orders sought to be reviewed were entered by the Fifth Circuit on May 24, 1963, and July 12, 1963, respectively. The petition was filed on December 11, 1963, well in excess of the ninety-day limitation. 28 U. S. C. §2101(c).

Petitioners seek to avoid the consequences of their default by resort to 28 U. S. C. §2101(e), which provides no time limitation for a petition for certiorari to review a case before judgment in the court of appeals. Reasoning that the Fifth Circuit has not finally disposed of the main appeal in these cases, petitioners contend that they may petition for review of the interlocutory rulings attacked here at their leisure. Such an argument plainly misconceives the role of certiorari before judgment. Limited to cases of extraordinary consequence, see Rule 20 of this Court, certiorari before judgment is designed to eliminate unnecessary delay, not excuse it.

The statute allowing certiorari before judgment, 28 U. S. C. §1254(1), creates a procedural device for review of district decisions where the normal delay of intermediate appeal is intolerable. Petitioners here, having prevailed in the district courts, are not asking review of the district court decisions. What they ask is review of a narrow procedural issue arising from the court of appeals' interlocutory rulings. Their petition comes not only after that ruling, but five and six months after the decree.

Another purpose of certiorari before judgment is to dispel confusion by deciding the entire case rather than awaiting piecemeal appeals. Here, certiorari before judgment might properly be invoked on behalf of the Negro school children—respondents in all these cases—to have the entire records sent to this Court from the district courts for reaffirmation of their right to relief under the doctrine of *Brown* v. *Board of Education*, 347 U. S. 483. But a grant of certiorari now for review merely of the propriety of the Fifth Circuit's action in protecting its jurisdiction would constitute a classic instance of piecemeal appeal. The main issues of the cases would remain unresolved, as this Court does not even have the benefit of the district court records.

The laws of procedure do not deprive petitioners of an opportunity to question the Fifth Circuit's interlocutory orders. They had ample opportunity to petition for review after the rulings were handed down. However, in the absence of an extension, they were entitled to only ninety days, which had long since passed when this petition was filed.

In a similar case, the school board did just that. The petition was denied. *Board of School Commissioners of Mobile County* v. *Davis*, 375 U. S. 894.

II.

The Petition Should Be Denied in the Glynn County Case Because There Is No Serious Doubt as to the Fifth Circuit's Power to Rule as It Did, and No Conflict of Circuits on the Question.

In the Glynn County case plaintiffs sought and obtained from the district court a temporary restraining order preventing the School Board from voluntarily effecting a limited degree of desegregation. The court's order was issued without notice on the day before school opened. The pre-trial order, in effect extending the duration of the restraining order, came after school had been in session for a week. Thus, some of the six Negro students, whose transfer applications had been accepted by the school authorities, had already been subjected to segregated schooling for a part of their final school year. By the time the Fifth Circuit issued its order, another two weeks had passed.

The Fifth Circuit vacated the temporary restraining order and pre-trial order, thus sustaining for the time being the school board's action in granting the transfers. In order to resolve any confusion in the school board's mind, the court of appeals also ordered the district court to require the admission of the Negro students by injunction.

The petitioners attack only that part of the court of appeals' order directing the district court to enter an injunction pending appeal. However, the petitioners were not parties to the injunction, and there is some question of their standing to assert its invalidity. Only the Board of Education and its members were enjoined, and they have not petitioned for review.

Moreover, the court of appeals' order adverse to petitioners' claim was not so much the injunction pending appeal as the vacation of the district court orders. By vacating the temporary restraining order and pre-trial order, the court of appeals freed the school board to follow its previously declared policy of admitting the Negro students to the white school. The petitioners make no claim that the court of appeals lacked power to vacate the district court's orders, and no such claim could seriously be made. The court of appeals had before it the verified pleadings on which the distfict court acted and thus was in a position to determine whether the district court's orders were erroneous.*

Thus it appears that petitioners, if they are not the wrong parties, are at least attacking the wrong order.† Nevertheless, in response to their contentions, it is clear that the issue raised need not trouble the Court. Petitioners argue that a court of appeals is without power, irrespective of the circumstances, to issue a mandatory injunction pending appeal which changes the status quo. They contend that aside from the three cases involved here and a similar case in which certiorari was recently denied,† the only four cases dealing with this issue have been decided contrary to the decisions below. This is far from correct.

The four cases cited by petitioners as creating a conflict of circuits are *Dunn* v. *Retail Clerks Int'l Ass'n*, 299 F. 2d 873 (6th Cir. 1962); *Hess* v. *Woods*, 185 F. 2d 404 (9th Cir. 1950); *Meredith* v. *Fair*, 305 F. 2d 341 (5th Cir. 1962); and *Greene* v. *Fair*, 314 F. 2d 200 (5th Cir. 1963). None

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* At the hearing on the motion for injunction pending appeal, plaintiffs' verified complaint and intervening defendants' verified complaint were submitted to the Fifth Circuit.

† *Board of School Commissioners of Mobile County* v. *Davis*, 375 U. S. 894.

of these cases holds that a court of appeals lacks power to issue, pending appeal, a mandatory injunction changing the status quo. Each merely represents an instance in which the court of appeals concluded that the circumstances did not justify such relief.

In the *Dunn* case, where the appellants sought an order, pending appeal, directing the Regional Director of the NLRB to file suit to restrain picketing of the appellants' premises, the Sixth Circuit noted that the Regional Director could refuse to file suit in the exercise of his discretion, and even if he did file the District Court might properly deny relief. In conclusion, the Sixth Circuit stated, "We think there is sufficient doubt about whether appellant will ultimately prevail as to make the granting of a mandatory injunction pending appeal *inadvisable*." (Emphasis added.) 299 F. 2d at 874.

In *Hess* v. *Woods*, 185 F. 2d 404 (1950), where the appellants sought to enjoin continuing enforcement of The Housing and Rent Act of 1947, the Ninth Circuit refused "to suspend all activity of an important governmental agency" pending appeal. The court's holding that "No such order with such far-reaching consequences should be made by any court before the merits of the controversy have been tried and adjudicated," 185 F. 2d at 404, is far from a repudiation of the power to grant interlocutory relief under appropriate conditions.

In *Meredith* v. *Fair*, 305 F. 2d 341 (1962), the Fifth Circuit refused in February 1962 to order James Meredith's admission to the University of Mississippi for the latter half of the school year pending appeal from the district court's decision. Balancing the equities in this case, the Fifth Circuit concluded that appellant's hardship was not sufficient to justify immediate relief pending a complete review of the proceedings below. The court also noted

that normal appellate process could be followed in time for the beginning of the next complete school year.

The last case cited by petitioners is *Greene* v. *Fair*, 314 F. 2d 341 (1963), in which the Fifth Circuit refused to order, pending appeal, the admission of another student to the University of Mississippi. Observing that the "extraordinary" relief requested "is granted only in exceptional cases," 314 F. 2d at 202, and where ultimate success is virtually certain, the court merely held that appellant had not met the strict standard. The Fifth Circuit listed a number of issues of doubtful determination remaining in the case.

That the asserted conflict of circuits is more apparent than real comes as no surprise. A court of equity is necessarily invested with broad powers to grant effective relief, and an appellate court must be empowered to preserve its appellate jurisdiction. Congress has provided the courts of appeals with the necessary tools, and has done so in inclusive terms. 28 U. S. C. §1651(a); 28 U. S. C. §2106. See also F. R. C. P., Rule 62(c),* (g).† While these powers must be exercised judiciously, the scope of judicial discretion is broad indeed.

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*Rule 62(c) provides:

"When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. * * *"

†Rule 62(g) provides:

"The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

Nevertheless, it is contended by petitioners that a hard and fast rule prevents a court of appeals from issuing an injunction changing the status quo pending the determination of the appeal. In other words, no matter what the circumstances and no matter what other powers the court of appeals may possess, this type of relief is absolutely forbidden. Such a wooden limitation on an equity court would be anomalous indeed.[10] In this case the anomaly is all the more starkly presented, for there is significant doubt about which parties were attempting to preserve the status quo. Certainly the Negro intervenors were attempting to preserve the status quo existing when the school board granted their applications for transfer. The plaintiffs interpret status quo altogether differently.

Unless the court of appeals was totally lacking in power to grant the relief requested of it, the Fifth Circuit acted properly. Faced with the preposterous situation of a federal judge interfering with voluntary school desegregation, it stepped in to prevent the passage of time from vitiating the Negro students' undoubted constitutional rights.[11]

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[10] Assuming that this Court could consider the merits of the petition in the Savannah and Birmingham cases, it is apparent that the Fifth Circuit had the same broad power to balance the equities and grant appropriate relief in those cases.

[11] It has been suggested that the Negro intervenors were granted all the relief they had requested. To the contrary, the Fifth Circuit did not order complete desegregation or the formulation of a desegregation plan. It merely provided for the transfer of those Negro students previously admitted to the white school.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
DERRICK A. BELL, JR.
NORMAN C. AMAKER
GEORGE B. SMITH
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents

OSCAR W. ADAMS, JR.
E. H. GADSEN
DONALD L. HOLLOWELL
ERNEST D. JACKSON, SR.
B. CLARENCE MAYFIELD
HORACE WARD

Of Counsel